

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
GRACE PACIFIC CORPORATION)
To Transfer a Motor Carrier)
Certificate or Permit.)
_____)

DOCKET NO. 05-0020

ORDER NO. 22062

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DIV. OF CONSUMER ADVOCACY
DEPT. OF COMMERCE AND
CONSUMER AFFAIRS
STATE OF HAWAII

Filed Oct. 7, 2005
At 2:30 o'clock P.M.

Karen Higashi.
Chief Clerk of the Commission

ATTEST: A True Copy
KAREN HIGASHI
Chief Clerk, Public Utilities
Commission, State of Hawaii.
K. Higashi.

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
GRACE PACIFIC CORPORATION)
To Transfer a Motor Carrier)
Certificate or Permit.)
_____)

Docket No. 05-0020

Order No. 22062

ORDER

By this Order, the commission: (1) denies the request by Operating Engineers Local Union No. 3 ("Local 3") for a stay of the application of GRACE PACIFIC CORPORATION ("Applicant" or "Grace Pacific") to transfer its motor carrier certificate number 222-C ("Certificate No. 222-C") to Ace Trucking, Inc. ("Ace Trucking"); (2) sets forth the procedural schedule determining the issues, schedule of proceedings and procedures which shall govern this docket; and (3) sets this matter for hearing, pursuant to Hawaii Revised Statutes ("HRS") § 271-18(d).

I.

Background

By application filed on January 31, 2005, Grace Pacific requests approval from the commission for a transfer of its Certificate No. 222-C to Ace Trucking, pursuant to HRS § 271-18 ("Application").¹

¹Certificate No. 222-C authorizes Grace to operate as a motor carrier in the dump truck classification on the island of Oahu.

Order No. 21898, filed in this docket on June 29, 2005, among other things, granted Local 3 participation status in this proceeding, pursuant to Hawaii Administrative Rules ("HAR") § 6-61-56, and ordered Grace Pacific and Local 3 to submit legal briefs to the commission on the issue of whether the instant proceeding should be stayed pending disposition of a complaint filed by Local 3 against Grace Pacific with the National Labor Relations Board ("NLRB") ("NLRB Complaint").²

On July 19, 2005, Local 3 timely filed its Brief in Support of Stay ("Brief in Support of Stay"). On that same day, Grace Pacific filed a timely Memorandum in Opposition to Local 3's Request that Application be Stayed ("Memorandum Opposing Stay").

II.

Stay

A.

Local 3's Position and Assertions

In support of a stay of the pending Application, Local 3 alleges, among other things:

1. Grace Pacific's intention is to set up an "alter ego"³ company in the form of Ace Trucking,

²In its Motion to Intervene, filed in this proceeding on April 28, 2005 ("Motion to Intervene"), Local 3 requested that the commission stay the Application pending a determination on the NLRB Complaint.

³See Brief in Support of Stay at 3.

to circumvent its collective bargaining obligations pursuant to federal law.

2. A stay of the Application until full and final resolution by the NLRB of Local 3's NLRB Complaint is in the best interest of protecting Local 3's members currently employed by Grace Pacific.
3. The determination of whether Grace Pacific's Application is illegal under federal labor law, as Local 3 alleges, should be made by the NLRB, the federal agency with special expertise in labor matters.
4. The commission should stay the Application to avoid ruling contrary to any NLRB decision and to avoid the possibility of upsetting any NLRB precedent.
5. Grace Pacific has all but conceded jurisdiction with the NLRB by its answer to Local 3's Petition To Compel Arbitration in the federal district court ("Petition to Compel"), wherein Grace Pacific purports that the federal court "must defer to the primary jurisdiction of the [NLRB]."⁴

⁴See Brief in Support of Stay at 5. The Petition to Compel, filed by Local 3 in Federal District Court on May 27, 2005, seeks to compel Grace Pacific to arbitrate its decision to transfer its trucking operations to Ace Trucking. See also Exhibits F and G to the Brief in Support of Stay.

B.

Grace Pacific's Position and Assertions

In opposition to the stay, Grace Pacific asserts, among other things:

1. Local 3 is misleading the commission regarding its charges before the NLRB. In particular, Grace Pacific states that of the initial three (3) charges, the only charge remaining to be determined by the NLRB, a request for information, does not form a legal basis to stay the instant proceeding.
2. There is no allegation of a conflict between the jurisdiction of the commission and that of the NLRB proceeding initiated by Local 3 to sufficiently justify a stay pending a NLRB decision.
3. Nothing in Chapter 271, HRS, allows the commission to condition the transfer of a license on an applicant's labor relations policies.
4. The delay in processing the Application, caused by the pending stay, is prejudicial to the business interests of Ace Trucking and Grace Pacific.

III.

Discussion

Local 3 asks the commission to stay the Application until "a full and final resolution"⁵ of Local 3's complaint against Grace Pacific before the NLRB. In response to a commission letter dated September 15, 2005, the NLRB informed the commission that of the three (3) initial charges made by Local 3 against Grace Pacific, i.e., (1) that Ace Trucking is the "alter ego" of Grace Pacific, created by Grace Pacific to avoid its contractual and statutory obligations; (2) that Grace Pacific has refused to bargain in good faith with Local 3; and (3) that Grace Pacific has failed to provide Local 3 with information necessary for the purposes of collective bargaining, the only remaining charge before the NLRB is what information is due Local 3 from Grace Pacific.⁶ The NLRB dismissed the "alter ego" and duty to bargain charges.⁷ Of the two (2) dismissed charges, Local 3 is only appealing the dismissal of the duty to bargain charge.

Thus, the only remaining charge before the NLRB is the request for information from Local 3 to Grace Pacific. The commission finds the remaining charge before the NLRB to be

⁵See Brief in Support of Stay at 3.

⁶See letter from Dale K. Yashiki, Field Attorney, NLRB, a copy which is attached hereto as Exhibit A.

⁷See letter from Joseph P. Norelli, Acting Regional Director, NLRB, dated August 31, 2005 ("Norelli Letter"), attached hereto as Exhibit B.

insufficient grounds on which to grant a stay of the Application. The NLRB dismissed the alter ego and refusal to bargain claims as premature: "The investigation revealed that Ace Trucking although established on paper, is not yet operational. Therefore, the charges that Ace is an alter ego of Grace, and that an obligation to enter into bargaining is premature [sic]."⁸ It appears, therefore, that the NLRB will not address these issues until Ace Trucking is operational.

Local 3 raises the specter of conflicting jurisdictions between the commission and the NLRB should the commission act on the Application rather than grant a stay. The commission is not persuaded by assertions of possible conflicts between commission jurisdiction and federal labor law jurisdiction or the prospect of the commission inadvertently overturning settled federal labor law precedent should the commission proceed with its review of the Application. The NLRB is free to address the "alter ego" and "obligation to bargain" claims after the commission reviews the Application, if it remains necessary for the NLRB to do so.

Finally, Local 3 argues that Grace Pacific has conceded that this instant proceeding is under federal jurisdiction by its answer to the Petition to Compel. We find that while Grace Pacific may have argued that the federal court must defer to the NLRB in its answer to the Petition to Compel, the issues involved in that matter are not those faced by the commission in the instant Application. Thus, we are not

⁸Norelli Letter at 1.

persuaded that Grace Pacific's alleged concession of NLRB jurisdiction, as related to the relevant issues in the Petition to Compel, warrants a stay of the instant matter.

The commission now addresses those arguments raised by Grace Pacific in opposing the proposed stay that have not been addressed in the discussion, above.

HRS § 271-18(d) provides in relevant part that the commission, in deciding upon an application involving the transfer of a motor carrier certificate, "shall give weight" to, among other considerations, "the employees of any transferring motor carrier". Thus, while Grace Pacific's argument that an applicant's labor relations policies are not a consideration in Chapter 271, HRS, may be correct in the narrow sense, the commission takes the broader view, as set forth in the statute, and finds that it is within the commission's purview to consider the employees in any application for a transfer of motor carrier certificate from one motor carrier to another.

Accordingly, upon a careful review of the positions of Local 3 and Grace Pacific, the commission concludes that Local 3's request for a stay of the pending Application should be denied. The commission also concludes that pursuant to HRS § 271-18(d), the commission should set a date for a hearing on the Application.⁹

⁹HRS § 271-18(d) provides, in relevant part, that in an application for a transfer of a motor carrier certificate, if requested, the commission shall afford a reasonable opportunity for interested parties to be heard. In its Request for Leave to Reply in Support of its Motion to Intervene, filed on May 13, 2005, Local 3 asked that it be afforded an opportunity to be heard if the commission does not stay the Application.

IV.

Procedural Provisions

Order No. 21898 directed Local 3 and Grace Pacific to submit a stipulated procedural order to formulate the issues, regulatory schedule and procedures to be utilized in this docket. On July 19, 2005, Local 3 and Grace Pacific submitted timely proposed procedural orders for commission consideration. They reached agreement on the schedule of proceedings and certain other procedural matters, however they could not agree on the statement of issues that would govern the proceedings in this docket.

Upon review and consideration of Local 3's and Grace Pacific's proposed procedural orders, the commission determines that the following issues, schedule of proceedings and procedures shall govern the proceedings of this docket.

A.

Statement of Issues

Upon a review of the proposed issues by Local 3 and Grace Pacific, the commission hereby sets forth the issues for this proceeding, as follows:

1. Whether the proposed transfer from Grace Pacific to its subsidiary, Ace Trucking, is just and reasonable and consistent with the public interest, pursuant to HRS § 271-18(d).

2. Whether the effect of the proposed transfer to Ace Trucking on Grace Pacific's existing employees covered under

the collective bargaining agreement, warrants a denial of the Application under HRS § 271-18(d).

B.

Schedule of Proceedings

Filing of First Set of Information Requests ("IRs") by Local 3	October 24, 2005
Filing of Response by Applicant	October 31, 2005
Filing of Second Set of IRs by Local 3	November 7, 2005
Filing of Response by Applicant to IRs	November 14, 2005
Filing of Final Position Statement	November 21, 2005
Pre-hearing conference	November 22, 2005 ¹⁰
Filing of Rebuttal Position Statement	November 28, 2005
Hearing	December 1, 2005 ¹¹

C.

Witnesses

Order No. 21949, filed on July 28, 2005, in this docket, denied Local 3's motion for reconsideration of Order No. 21898 ("Motion for Reconsideration"). In the Motion for Reconsideration, Local 3 requested that the commission grant it full participation in the hearing to be

¹⁰The pre-hearing conference is scheduled at 2:00 p.m. in the commission's conference room.

¹¹The hearing is scheduled at 9:00 a.m. in the commission's hearing room.

scheduled. In particular, Local 3 requested that it be allowed to submit evidence, and call and cross-examine witnesses.

Order No. 21949 denied Local 3's Motion for Reconsideration and affirmed the parameters for its participation, set forth in Order No. 21898. Accordingly, at the hearing to be held on December 1, 2005, the commission determines that, pursuant to Order Nos. 21898 and 21949, Local 3's participation in the hearing will be limited to the opportunity to call its own witnesses and to present written testimony and exhibits and that Local 3 will not be able to cross-examine any witnesses of Grace Pacific.¹²

The parties in this case should cooperate to accommodate the schedules of witnesses and should inform the commission, at the pre-hearing conference, of the number of witnesses each party plans to call. The parties should be prepared to submit, at the pre-hearing conference, a list identifying all witnesses and the subject matter of their testimony, and the names of the respective counsel that will be undertaking the direct examination, and in Grace Pacific's case, the cross-examination, of the witnesses.

¹²Pursuant to HRS § 271-18(d), the commission shall afford a "reasonable opportunity" for parties to be heard in any application for transfer of a motor carrier certificate or permit. In addition, HAR § 6-61-56 provides, in relevant part, that the commission may permit participation "to the degree ordered by the commission" and that any such participation "shall be determined in the order granting participation or in the prehearing order". In granting Local 3 participant status, the commission determined the extent of Local 3's participation, as it relates to a hearing, to be limited to "the opportunity to be heard". Order No. 21898 at 10. The extent of Local 3's participation at a hearing was affirmed in Order No. 21949.

Cross-examination by Grace Pacific of any witness called by Local 3 shall be limited to one attorney. Local 3 and Grace Pacific should avoid duplicate or repetitious testimony. There shall be no friendly cross-examination. The examination of witnesses shall be conducted in the manner and order to be determined by the commission at the pre-hearing conference.

D.

Requests for Information

Local 3 is permitted to serve two (2) sets of IRs on Applicant. After the scheduled date for submitting IRs has passed, no requests for information shall be allowed without the specific approval of the commission, upon good cause shown, except upon stipulation of Local 3 and Applicant.

In lieu of responses to IRs that would require the reproduction of voluminous documents or materials (documents consisting of one-hundred (100) pages or more), the documents or materials may be made available for reasonable inspection and copying at a mutually agreeable designated location and time. In the event such information is available on computer diskette, the party responding to the IR may make the diskette available to all parties and the commission.

A party shall not be required, in response to an IR, to provide data that are already on file with the commission or otherwise part of the public record, except as provided in Part F., *infra*. The responding party shall, in lieu of producing a document in the public record, include in its response to the

IR an identification of the document with reasonable specificity sufficient to enable the requesting party to locate and copy the document. In addition, a party shall not be required, in a response to an IR, to make computations, compute ratios, reclassify, trend, calculate, or otherwise rework data contained in its files or records, unless so ordered by the commission.

A party may object to responding to an IR that it deems to be irrelevant, immaterial, unduly burdensome, onerous or repetitious or where the response contains information claimed to be privileged or subject to protection (confidential information). If a party claims that information requested is confidential, and withholds production of all or a portion of such confidential information, the party shall: (1) provide information reasonably sufficient to identify the confidential information withheld from the response, without disclosing privileged or protected information; (2) state the basis for withholding the confidential information (including, but not limited to, the specific privilege applicable or protection claimed for the confidential information and the specific harm that would befall the party if the information were disclosed); and (3) state whether the party is willing to provide the confidential information pursuant to a protective order governing this docket. A party seeking production of documents, notwithstanding a party's claim of confidentiality, may file a motion to compel production with the commission.

E.

Position Statements

Local 3 and Applicant may file a position statement and a rebuttal position statement by the deadlines set forth herein. The position statement shall not be longer than fifteen (15) pages, typed and double-spaced, exclusive of exhibits. The rebuttal position statement shall not be longer than ten (10) pages, typed and double-spaced, exclusive of exhibits. Each document will be hand-delivered to the other party on the date that it is due to be filed with the commission.

F.

Matters of Public Record

The parties shall provide copies of their annual financial reports, applications and exhibits, as well as any decisions and orders relating to a party, that have been filed with the commission, when requested by another party to this proceeding. In order to reduce unnecessary reproduction of documents and to facilitate these proceedings, identified matters of public record, such as published decisions of this or other commissions and state and federal courts, published scientific or economic statistical data, material and textbooks, technical or industry journals relating to matters covered in this docket, and specified parts of the record in previous commission dockets shall be admissible in this proceeding without the necessity of reproducing each document; provided that the document to be admitted is: (1) clearly identified by reference to the place of

publication, file or docket number; and (2) available for inspection by the commission and the other parties; and further provided that any party has the right to explain, qualify or conduct examination with respect to the identified document. The commission can rule on whether the identified document can be accepted by the commission in considering the positions of the parties.

From time to time, the parties may enter into stipulations that such documents, or any portion of such documents, may be submitted to the commission.

G.

Copies of Statements, Filings and IRs

1. Each party shall file and serve copies of statements, exhibits, IRs and responses to IRs to the commission and other parties as follows:

Commission	Original + eight (8) copies
Grace Pacific and Local 3	One (1) copy

2. All pleadings, briefs and other documents required to be filed with the commission shall be filed at the office of the commission in Honolulu within the time limit prescribed pursuant to HAR § 6-6-15.

H.

Communications

HAR § 6-61-29 concerning *ex parte* communications is applicable to any communications between a party and the commission. However, the parties may communicate with commission counsel on matters of practice and procedure through their own counsel or designated official.

Communications between the parties should either be through counsel or through designated representatives. All pleadings, papers, and other documents filed in this proceeding shall be served on the opposing party.

I.

General

These procedures are consistent with the orderly conduct of this docket. Pursuant to HAR § 6-61-37, this procedural schedule shall control the subsequent course of the proceedings unless modified at or prior to the hearings to prevent manifest injustice. The commission reserves the right to require information to be submitted for the record during or after the hearing.

V.

Orders

THE COMMISSION ORDERS:

1. Local 3's request for a stay of Grace Pacific's Application is denied.

2. Local 3 and Grace Pacific shall adhere to the procedural schedule, set forth in Section IV above, which shall govern the issues, schedule of proceedings and procedures in this proceeding.

3. A pre-hearing conference is scheduled for November 22, 2005, at 2:00 p.m. in the commission's conference room.

4. This matter is set for a hearing, pursuant to HRS § 271-18(d), on December 1, 2005, at 9:00 a.m. at the commission's hearing room.

DONE at Honolulu, Hawaii OCT - 7 2005.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By Carlito P. Caliboso
Carlito P. Caliboso, Chairman

By (EXCUSED)
Wayne H. Kimura, Commissioner

By Janet E. Kawelo
Janet E. Kawelo, Commissioner

APPROVED AS TO FORM:

Benedyne S. Stone
Benedyne S. Stone
Commission Counsel

05-0020.rpr



NATIONAL LABOR RELATIONS BOARD

SubRegion 37

300 Ala Moana Boulevard, Room 7318
P.O. Box 50208
Honolulu, HI 96850-0001

Telephone Number: (808) 541-2814
Fax Number: (808) 541-2818

September 16, 2005

PUBLIC UTILITIES
COMMISSION

2005 SEP 19 A 11:00

FILED

Benedyne Stone, Esq.
Public Utilities Commission
465 S. King Street, #103
Honolulu, Hawaii 96813

**Re: 05-0020 Grace Pacific Corporation ("Grace Pacific"), Application to
Transfer Certificate No. 222-C to Ace Trucking ("Ace Trucking"),
Inc.**

Dear Ms. Stone:

In response to your question regarding the status of Case No. 37-CA-6847-1 posed in your letter to me dated September 15, 2005, I have enclosed copies of the following public documents related to that case:

1. Charge filed by the Operating Engineers Local Union No. 3, International Union of Operating Engineers, AFL-CIO dated April 12, 2005.
2. Partial Dismissal letter dated August 31, 2005.
3. Complaint dated August 31, 2005 against Grace Pacific Corporation.

The Union has appealed our decision to dismiss the portion of its charge alleging that the Employer violated the National Labor Relations Act by refusing to bargain with it over Ace Trucking's impact on the current bargaining unit. This appeal is currently under review by our Office of Appeals.

I trust that this information is sufficient for your purposes. Should you require additional information, please send us a letter detailing the information you require, the reason you require the information, and the reason the information that has been provided to you is insufficient.

Please feel free to contact me at (808) 541-3193 should you have any questions.

Very truly yours,

A handwritten signature in black ink, appearing to read "Dale K. Yashiki".
Dale K. Yashiki, Field Attorney

Enclosures

cc: Richard Rand, Esq.; Ashley Ikeda, Esq.; Shirley Lee, Esq. (all w/out enclosures)



NATIONAL LABOR RELATIONS BOARD

SubRegion 37

300 Ala Moana Boulevard, Room 7-245

P.O. Box 50208

Honolulu, Hawaii 96850-0001

Telephone Number: 808/541-2814

Facsimile Number: 808/541-2818

August 31, 2005

Shirley Lee, Esq.
Weinberg Roger & Rosenfeld
301 North lake Avenue, Suite 310
Pasadena, CA 91101-5122

Re: **Grace Pacific Corporation**
Case 37-CA-6847-1

Dear Ms. Lee:

The Region has carefully investigated and considered your charge against Grace Pacific Corporation ("Employer") alleging violations under Section 8 of the National Labor Relations Act. Your charge consisted of the following three allegations: the Employer has established an alter ego in the form of Ace Trucking, the Employer has refused to bargain with the Union over the effects of the creation of Ace Trucking, and the Employer has refused to provide requested information necessary for the purposes of collective bargaining.

Decision to Dismiss: Based on that investigation, I have concluded that further proceedings are not warranted for the portions of the charge relating to the alter ego and refusal to bargain allegations, and I am dismissing your charge in part as it relates to those two allegations for the following reasons:

The investigation revealed that Ace Trucking although established on paper, is not yet operational. Therefore, the charges that Ace is an alter ego of Grace, and that an obligation to enter into bargaining is premature.

This action in no way affects the remaining portion of the charge alleging violations of 8(a)(5) of the Act, which allegations will be subject to further proceedings.

Your Right to Appeal: The National Labor Relations Board Rules and Regulations permit you to obtain a review of this action by filing an appeal with the General Counsel of the National Labor Relations Board. If you wish to file an appeal, your attention is directed to the following:

Appeal Due Date: The appeal must be received by the General Counsel in Washington, D.C. by the close of business at 5:00 p.m.(EST) on September 14, 2005. However, if you mail the appeal, it will be considered timely if it is postmarked no later than one day before the due date. The appeal MAY NOT be filed by facsimile transmission or through the internet.

Extension of Time to File Appeal: Upon good cause shown, the General Counsel may grant you an extension of time to file the appeal. You may file a request for an extension of time to

file by mail, facsimile transmission, or through the internet. The fax number is (202) 273-4283. Special instructions for requesting an extension of time over the Internet are set forth in the Access Code Certificate that will be forwarded to you under separate cover. While an appeal will be accepted as timely filed if it is postmarked no later than one day prior to the appeal due date, this rule does not apply to requests for extensions of time. A request for an extension of time to file an appeal **must be received** on or before the original appeal due date. A request that is postmarked prior to the appeal due date but received after the appeal due date will be rejected as untimely. Unless filed through the Internet, a copy of any request for extension of time should be sent to me.

Appeal Contents: You are encouraged to submit a complete statement setting forth the facts and reasons why you believe the decision to dismiss your charge was incorrect. However, the enclosed Appeal Form (NLRB-4767) by itself will be treated as an appeal if timely filed upon the General Counsel and me.

Confidentiality/Privilege: Please be advised that we cannot accept any limitations on the use of any appeal statement or evidence in support thereof provided to the Agency. Thus, any claim of confidentiality or privilege cannot be honored, except as provided by the FOIA, 5 U.S.C. 552, and any appeal statement may be subject to discretionary disclosure to a party upon request during the processing of the appeal. In the event the appeal is sustained, any statement or material submitted may be subject to introduction as evidence at any hearing that may be held before an administrative law judge. Further, we are required by the Federal Records Act to keep copies of documents used in our case handling for some period of years after a case closes. Accordingly, we may be required by the FOIA to disclose such records upon request, absent some applicable exemption such as those that protect confidential source, commercial/financial information or personal privacy interests (e.g., FOIA Exemptions 4, 6, 7(C) and 7(D), 5 U.S.C. §552(b)(4), (6), (7)(C), and (7)(D)). Accordingly, we will not honor any requests to place limitations on our use of appeal statements or supporting evidence beyond those prescribed by the foregoing laws, regulations, and policies.

Address for Appeal: The appeal should be sent to the General Counsel of the National Labor Relations Board, Office of Appeals, 1099 14th Street, N.W., Washington, D.C. 20570. You should send a copy of the appeal to me.

Notice to Other Parties of Appeal: You should notify the other party(ies) to the case that an appeal has been filed. Therefore, at the time the appeal is sent to the General Counsel, please complete the enclosed Appeal Form (NLRB-4767) and send one copy of the form to all parties whose names and addresses are set forth in this letter.

Very truly yours,



Joseph P. Norelli
Acting Regional Director

JPN:kt

Enclosures

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Order No. 22062 upon the following parties, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

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Honolulu, HI 96809

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C/O RAYMOND MALUNAO, JR.
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Certificate of Service - Continued

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Karen Higashi

DATED: OCT - 7 2005